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Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-274

ALLEN COHEN, *Petitioner*

vs.

RICHARD HONGISTO, Sheriff of the City and County of San Francisco, et al., *Respondents*

and

THE PEOPLE OF THE STATE OF CALIFORNIA, *Real Party in Interest*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

PAUL N. HALVONIK,
FRIEDMAN, SLOAN & HALVONIK,
680 Beach Street, Suite 436,
San Francisco, California 94109,
Telephone: (415) 776-3070,

CHARLES C. MARSON,
MARSHALL W. KRAUSE,
American Civil Liberties Union
of Northern California,
593 Market Street,
San Francisco, California 94105,
Telephone: (415) 433-2750,
Attorneys for Petitioner.

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ALLEN COHEN, *Petitioner*

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THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner, Allen Cohen, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-captioned case on May 23, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not as yet reported. It is reproduced as Appendix "A" to this petition.

The opinion of the United States District Court for the Northern District of California issued on April 2, 1971, is unreported and is reproduced as Appendix "B" to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 23, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether, after exhaustion of all available state remedies, federal habeas corpus is available to review a constitutionally infirm conviction of one who, because he has been sentenced to pay a fine, is not in actual physical custody at the time he applies for the writ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, §9:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

28 U.S.C. §2241:

"(a) Writs of Habeas Corpus may be granted by . . . the District Courts . . . (c) The Writ of Habeas Corpus shall not be extended to a prisoner unless—

. . . (3) he is in custody in violation of the Constitution or laws or treaties of the United States;"

28 U.S.C. §2251:

"A . . . judge of the United States before whom a Habeas Corpus proceeding is pending, may, . . . stay any proceeding against the person detained in any State court by or under the authority of any State for any matter involved in a Habeas Corpus proceeding."

STATEMENT OF THE CASE

On November 15, 1966, Officer Sol Weiner and Inspector Peter Maloney of the San Francisco Police Department entered the Psychedelic Shop at 1535 Haight Street. Officer Weiner ostensibly purchased a copy of a poem by Lenore Kandel entitled *The Love Book* from petitioner Cohen (Officer Weiner later confiscated the money used for the "purchase"). Petitioner was placed under arrest at that time. Co-defendant Thelin, who was present in the store at the time petitioner was arrested, was subsequently arrested at petitioner's arraignment on November 16, 1966, pursuant to an arrest warrant. (C.T. 3-4).

The Love Book had first come to the attention of Officer Weiner and Inspector Maloney a few days

earlier when they had purchased a copy at the San Francisco's City Lights Bookstore from petitioner's other co-defendant, Muszalski. The policemen, although they had the book for five days without making any arrests, sought no independent judicial determination as to *The Love Book's* obscenity, but made their own decision after the City Lights purchase.

Muszalski had not been arrested at the time of the initial purchase of *The Love Book;* he was arrested on November 17, 1966, when Officer Weiner and Inspector Maloney returned to City Lights Bookstore (after the arrest of petitioner and Thelin) and purchased another copy of *The Love Book* from him.

During the trial of petitioner and his co-defendants in the San Francisco Municipal Court, the trial judge made a number of rulings which petitioner contended, in his petition in the District Court, were contrary to law, unconstitutional because inconsistent with his rights under the First and Fourteenth Amendments to the United States Constitution, and prejudicial error. Those alleged errors were:

1. The trial court did not require that the prosecution establish that *The Love Book* was utterly without redeeming social importance, instead ruling that petitioner could be found guilty if it were established that *The Love Book* lacked redeeming social importance for "the average person." Consistent with that ruling the court also instructed the jury that petitioner could be found guilty if the matter lacked redeeming social importance for the average man,

2. The trial court permitted the jury to consider the effect of *The Love Book* on minors.

3. The trial court erroneously instructed the jury that they were the judges of what was the common conscience of the community. (C.T. 4-5).

4. The trial court permitted evidence of "sacrilege" to be considered by the jury.

5. The trial court prohibited testimony of expert witnesses proffered by petitioner and permitted inexpert witnesses proffered by the prosecution to testify about their view of *The Love Book*.

6. Petitioner was not permitted to introduce evidence relevant to contemporary community standards.

7. The court improperly permitted the jury to consider whether *The Love Book* was "immoral."

8. The trial court permitted the prosecution to question witnesses as to whether, in their opinion, certain portions of *The Love Book*, in isolation, were obscene.

9. In addition, petitioner contended that his conviction was also violative of the Constitution of the United States in that:

A. Copies of *The Love Book* that were introduced into evidence against petitioner at the trial were the product of a seizure that was inconsistent with the First and Fourth Amendments to the United States Constitution.

B. There was no evidence to support the judgment of conviction. (C.T. 5).

Petitioner was found guilty, by the Municipal Court jury, of distributing obscenity in violation of California Penal Code §311.2 and fined $50.00. The Appellate Department of the Superior Court in and for the City and County of San Francisco affirmed that conviction without filing a written opinion. Petitioner then applied to the California Court of Appeal for a writ of habeas corpus. That court, also without written opinion, denied the writ. A divided California Supreme Court, by vote of 4-3, also denied petitioner's application for a writ of habeas corpus. (C.T. 2).

Petitioner, his state remedies exhausted, filed his petition for writ of habeas corpus in the court below on September 9, 1970. (C.T. 1). In order to preserve jurisdiction over the matter, the District Court issued its order staying execution of sentence on September 10, 1970, at 9:00 a.m. fifteen minutes before petitioner was to pay his fine. (C.T. 12-14). His co-defendants did not join him in that petition, as they had in all state court proceedings, because they had been required to pay their fines before their petition could be filed and their case was, accordingly, moot. Petitioner's petition for writ of habeas corpus was granted on April 2, 1971 (C.T. 60-64), the Honorable Alfonso J. Zirpoli holding petitioner's conviction constitutionally infirm because the Municipal Court had improperly instructed the trial jury on the obscenity element of redeeming social importance. Because the District Court accorded petitioner relief on the redeeming social importance issue, Judge Zirpoli found it unnecessary to address petitioner's other contentions regard-

ing the constitutional infirmity of his conviction. (C.T. 62).

The State appealed, and, on May 23, 1972, the United States Court of Appeals reversed the judgment of the District Court on the exclusive ground that, since petitioner had not been in actual physical custody at the time of his application for writ of habeas corpus, the District Court did not have jurisdiction to entertain the suit. See Appendix A.

REASONS FOR GRANTING THE WRIT

According to the United States Court of Appeals for the Ninth Circuit, the States may insulate from federal review convictions which affront federally protected rights (including, as here, First Amendment rights) by the simple expedient of imposing criminal sanctions other than incarceration.[1] The opinion

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[1]That states the issue forcefully but the United States Court of Appeals for the Ninth Circuit has itself described the unavailability of federal habeas corpus to one who has incurred a fine in exactly the same terms:

> "The availability of habeas corpus appears particularly appropriate where the petitioner, although not held presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issues he raises. That is the predicament faced by the appellant here; if habeas corpus is not available, the Yakima Indian Nation can conceivably avoid the imposition of any due process safeguards merely by rendering fines rather than prison sentences." *Settler v. Yakima Tribal Court*, 419 F.2d 486, 490 (9th Cir. 1969) *cert. denied, sub nom. Yakima Tribal Court v. Settler*, 398 U.S. 903 (footnote omitted).

In the instant case the Ninth Circuit has evidently overruled, *sub silentio*, *Settler v. Yakima Tribal Court*. In *Choung v. Misterly*, 456 F.2d 176 (9th Cir. 1972) (certiorari pending, No. 71-1562), the Ninth Circuit said, without explaining why, that its

of the Ninth Circuit in this case conflicts with decisions in the other circuits and with fundamental principles of habeas corpus jurisdiction announced by this Court.

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1. THE RULE OF THE NINTH CIRCUIT CONFLICTS WITH THE DECISIONS OF EVERY OTHER CIRCUIT THAT HAS RECENTLY CONSIDERED THE QUESTION OF THE AVAILABILITY OF HABEAS CORPUS TO ONE IN CONSTRUCTIVE CUSTODY.

The decision below holds that habeas corpus is not available to one who suffers imposition of criminal sanction other than imprisonment. The Great Writ does not, the Ninth Circuit has held, lie for one who has suffered the imposition of a fine in violation of the United States Constitution.

The Ninth Circuit's decision in this case, and in *Hensley v. Municipal Court,* 453 F.2d 1242 (9th Cir. 1972) (certiorari pending, No. 71-1428), and *Choung v. Misterly,* 456 F.2d 176 (9th Cir. 1972) (certiorari pending, No. 71-1562), places it in opposition to every Court of Appeals that has recently considered the problem of the availability of the writ of habeas

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conclusion that habeas corpus would not be available to one not in actual physical custody was not inconsistent with *Settler.* 456 F.2d at 178, n. 2. Both *Choung* and *Hensley v. Municipal Court,* 453 F.2d 1252 (9th Cir. 1972) (certiorari pending, No. 71-1428), could be distinguished from *Settler* on the not very satisfactory ground that *Settler* involved one whose only penalty was a fine while Choung and Hensley were persons who would soon actually be in physical custody and then have the writ available to them. But the within petitioner, like *Settler,* has not been sentenced to physical confinement but, rather, has had a fine imposed. There is, thus, no conceivable distinction between this case and *Settler* and, it should be noted, the disclaimer which appeared in footnote 2 of *Choung* does not appear in the Ninth Circuit's opinion in this case. See Appendix A.

corpus to one not in actual physical custody. *Burris v. Ryan,* 397 F.2d 553 (7th Cir. 1968); *Marden v. Purdy,* 409 F.2d 784 (5th Cir. 1969); *Capler v. City of Greenville,* 422 F.2d 299 (5th Cir. 1970); and see *Williams v. Rogers,* 449 F.2d 513 (8th Cir. 1971); *Sellers v. Smith,* 412 F.2d 1002 (5th Cir. 1969); *Brown v. Resor,* 407 F.2d 281 (5th Cir. 1969); *Hewitt v. State of North Carolina,* 415 F.2d 1316 (4th Cir. 1969); *United States ex rel. Chapparo v. Resor,* 412 F.2d 433 (4th Cir. 1969); *Meadows v. New York,* 426 F.2d 1176 (2d Cir. 1970) *cert. denied,* 401 U.S. 941; *Hammond v. Lenfest,* 398 F.2d 705 (2d Cir. 1968).[2]

Legal scholars agree that the rule obtaining in the Courts of Appeals other than the Ninth Circuit is the rule consistent with the purposes of the Great Writ. See Sokol, FEDERAL HABEAS CORPUS, p. 66 (Second Ed. 1969) ("custody does not necessarily mean actual physical detention in a jail or prison. Rather, the term is synonymous with restraint of liberty."); Ferris and Ferris, THE LAW OF EXTRAORDINARY LEGAL REMEDIES, pp. 32-33 (1926) ("Actual physical restraint, as confinement in jail, is not necessary.")

And the American Bar Association Standards on post-conviction remedies, published in January of 1967, notes that in habeas cases:

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[2]The district courts, too, have almost universally adopted a rule permitting the granting of the habeas writ to one in constructive custody. See *Ouelette v. Sarver,* 307 F.Supp. 1099 (D.C.Ark. 1970) aff'd. 428 F.2d 804 (8th Cir. 1970); *Reis v. U.S. Marshall,* 192 F.Supp. 79 (E.D.La. 1961); *Foster v. Gilbert,* 264 F.Supp. 209 (S.D.Fla. 1967); *Whittington v. Gaither,* 272 F.Supp. 507 (N.D.Tex. 1967); *Nash v. Purdy,* 283 F.Supp. 837 (S.D.Fla. 1968); *United States ex rel. Prieter v. Fay,* 223 F.Supp. 629 (S.D.N.Y. 1963).

> "[T]he availability of post-conviction relief should not be dependent on the applicant's attacking a sentence of imprisonment then being served or other restraint."

In short, there is conflict among the circuits and the rule enforced outside the Ninth Circuit is the sounder rule.

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2. THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH FUNDAMENTAL HABEAS CORPUS PRINCIPLES ANNOUNCED BY THIS COURT.

The decision of the court below is predicated on the theory that habeas corpus is available only to those in actual physical custody. But "in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." *Jones v. Cunningham,* 371 U.S. 236, 239 (1963).

In *Jones,* this Court reversed a Court of Appeals decision holding habeas unavailable to a parolee because the parolee was not in actual, physical custody. This Court said:

> "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Id.* at 240.

This Court observed that a theory restricting availability of habeas corpus to those in physical custody misconceived the purpose of the writ:

> "It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.* at 243.

In *Peyton v. Rowe,* 391 U.S. 54 (1968), this Court, following the *Jones* rationale, overruled *McNally v. Hill,* 293 U.S. 131 (1934) and made habeas corpus available to "a prisoner incarcerated under consecutive sentences who claims that a sentence that he is scheduled to serve in the future is invalid because of a deprivation of rights guaranteed by the Constitution." 391 U.S. at 95. This Court concluded that *McNally's* major premise, that the writ of habeas corpus is available only when it can physically release someone from custody, "finds no support in the statute and has been rejected by this Court in subsequent decisions." 391 U.S. at 67.

This Court held that the habeas writ is not simply a procedural device for releasing persons from actual physical restraint. It is a great deal more. It "is a procedural device for subjecting . . . restraints on liberty to judicial scrutiny." *Id.* at 58.[3]

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[3]See also *Carafas v. LaValle,* 391 U.S. 344 (1968); *Ginsberg v. New York,* 390 U.S. 629 (1968); *Hirabayashi v. United States,* 320 U.S. 81, 108, n. 2 (1943). In *Carafas* this court held habeas available to a parolee who had been unconditionally released from his parole status after his petition for a writ of habeas corpus had been filed. This court said that habeas was available because Carafas "is suffering, and will continue to suffer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious." *Carafas v. LaValle, supra,* 391 U.S. at 239. Like Carafas, the within petitioner is suffering collateral consequences because

Petitioner is suffering a restraint on his liberty not generally shared by the public at large. He suffers a sanction which he contends, and the District Court held, was imposed in violation of the First Amendment to the United States Constitution. A $50.00 fine is a restraint of sufficient significance to warrant federal review of alleged constitutional violations. Cf. *Thompson v. City of Louisville,* 362 U.S. 199, 203-204 (1960). Because petitioner is restrained of his liberty in violation of the First Amendment, habeas corpus is available to vindicate his constitutional claim.

CONCLUSION

Petitioner is a bookseller who stands convicted for selling a poem to a police officer. The poem, in the opinion of numerous experts who testified at his trial, abounds in redeeming social importance. Petitioner contends that his conviction affronts the First Amendment to the United States Constitution. He has exhausted all of his State remedies. He has gone through a five-week trial, appealed his case to the California Superior Court (the only appeal provided under Cali-

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of his conviction, through no fault of his own, and his claim that he has been illegally convicted is, at least in the opinion of the District Court, meritorious. In addition to the fine petitioner suffers from statutory collateral consequences under California law. Sale of obscene matter is punished as a misdemeanor in California unless one has a prior conviction. If he has a prior conviction, he will be punished as a felon. Cal. Pen. Code §311.9. This collateral consequence has a great deal of impact on a book seller, like petitioner, who has been convicted of selling obscenity because he sold a poem by a well-known poet. He will simply have to avoid selling any books no matter what their merit, that deal explicitly with the sexual aspects of life.

fornia law) and sought habeas corpus in the California Court of Appeal and California Supreme Court. He now seeks to have his conviction reviewed by the federal courts. But the Ninth Circuit has held that habeas corpus is not available to petitioner and never will be available to petitioner, for under the Ninth Circuit theory of habeas jurisdiction one who has been sentenced to pay a fine may not have federal review of his conviction.

It simply cannot be the law that one who suffers under criminal penalties by virtue of his exercise of First Amendment rights cannot have those rights vindicated in the federal courts. What the Ninth Circuit has done, in effect, is suspend the writ of habeas corpus in violation of Article I, Section 9 of the United States Constitution. For that reason, and all the reasons mentioned, petitioner respectfully urges that his petition for a writ of certiorari be granted.

Dated: August 4, 1972

Respectfully submitted,

PAUL N. HALVONIK,
FRIEDMAN, SLOAN & HALVONIK,
CHARLES C. MARSON,
MARSHALL W. KRAUSE,
American Civil Liberties Union
of Northern California,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 71-2023

Allen Cohen,
Plaintiff-Appellee,
vs.
Matthew Carberry, Sheriff of the City and County of San Francisco, and Honorable John A. O'Kane, Judge of the Municipal Court for the Judicial District of the City and County of San Francisco,
Defendants-Appellants.

[May 23, 1972]

ORDER

Before: BROWNING and TRASK, Circuit Judges, and FERGUSON,* District Judge

The judgment is vacated and the cause remanded to the district court for consideration of the question of jurisdiction in light of our decisions in *Choung v. Misterly,* ..... F.2d ..... (9th Cir. March 6, 1972), *Matysek v. United States,* 339 F.2d 389 (9th Cir. 1964), and other relevant authority.

Dated: May 23, 1972

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

Appendix B

United States District Court
For the Northern District of California

No. C-70 1924 AJZ

Allen Cohen,
Petitioner,
vs.
Matthew Carberry, etc., et al.,
Respondents.

[April 2, 1971]

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Ronald Muszalski and Ronald Thelin were charged by complaint in the Municipal Court of San Francisco with having violated Penal Code § 311.2 (sale or distribution of obscene matter) in November of 1966. The obscene matter which petitioner was charged with selling or distributing was The Love Book written by Lenore Kandel.

On December 15, 1966, on petitioner's motion, all but one copy of The Love Book, previously seized, were returned. On February 8, 1967, petitioner entered a plea of not guilty. The cause came on for jury trial on April 24, 1967. On May 26, 1967, the jury returned a verdict finding petitioner guilty as charged.

On June 23, 1967, petitioner Cohen and Muszalski were each fined $50 and placed on six months' probation. Thelin was fined $100 and placed on six months'

probation. The Court, however, stayed execution of sentence and released petitioner on bail pending appeal. On appeal, the Appellate Department of the Superior Court of the City and County of San Francisco affirmed the judgment and conviction without written opinion on March 6, 1970. A petition for rehearing, stay of remittitur and motion to certify the case to the District Court of Appeal was denied by said Appellate Department of the Superior Court on March 27, 1970.

Petitioner then petitioned the California Court of Appeal for a writ of habeas corpus. During the pendency of that petition, execution of the sentence was stayed by the Municipal Court. On August 2, 1970, that court denied the petition. Thereafter, the Municipal Court notified petitioner that it intended to execute sentence on September 10, 1970. In order to prevent petitioner's case from becoming moot while he petitioned the California Supreme Court, and later this court if necessary, this court stayed execution of the sentence September 10, 1970 to allow petitioner to exhaust his state remedies. *See Hill v. Nelson,* 272 F. Supp. 790, 798 (N.D. Cal. 1967).

Petitioner's application for a writ of habeas corpus was denied without opinion by the California Supreme Court. Petitioner is now before this court on a hearing on an order to show cause why the writ should not issue.

Petitioner asserts seven grounds as error in his state trial which, he argues, justify granting the writ. These are: (1) improper admission into evidence of

testimony on the effect of The Love Book on young people; (2) improper instructions on the "redeeming social importance" test; (3) improper instructions on the "community standards" test; (4) improper admission into evidence of testimony on The Love Book's being sacrilegious and immoral; (5) improper exclusion of petitioner's proffered evidence of "contemporary community standard"; (6) illegal seizure of evidence; and (7) insufficiency of evidence leading to conviction. Because this court concludes that there were improper instructions on the "redeeming social importance" test and this error warrants issuance of the writ, there is no need to reach the other issue raised by petitioner.[1]

The trial judge instructed the jury as follows: "Third, that the average person applying contemporary community standards would conclude that the matter is utterly without redeeming social importance." Petitioner asserts that this instruction allowed the jury to find The Love Book obscene if the average person would find it utterly without redeeming social importance. Respondent asserts that the instruction merely means that the average person is to apply con-

[1]It is useful to note, however, that petitioner's seizure claim—really a thinly disguised argument that the state may not institute an obscenity prosecution unless it first conducts an adversary, noncriminal proceeding to determine if the work in question is obscene—was recently rejected in *Milky Way Productions, Inc. v. Leary*, 305 F.Supp. 288 (S.D. N.Y. 1970) (three-judge court), *aff'd*, 397 U.S. 98 (1970). Furthermore, petitioner's argument that there was insufficient evidence to convict on the grounds that *Stanley v. Georgia*, 394 U.S. 557 (1969), limits the scope of the *Roth* definition of obscenity to works offered to children or unconsenting adults is currently before the Supreme Court. *See* 39 U.S.L.W. 3317 (Jan. 26, 1971). While the court finds this argument compelling, there is no need to reach this question here.

temporary community standards to determine if the work is utterly without redeeming social importance. Although an examination of the trial transcript reveals clearly that the former interpretation was intended, even if the latter were intended, it falls short of the ruling of the Supreme Court in *Roth v. United States,* 354 U.S. 476 (1957). In *Roth,* the Court, at 484, said:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, *even ideas hateful to the prevailing climate of opinion*—have the full protection of the guarantees [of the first amendment]." (Emphasis added).

Under this test, it is clear that there are no restraints on the redeeming social importance test. It is not modified by either the average man standard or the contemporary community standards standard. It is an element standing alone, and, in and of itself, is intended to protect those works beyond the understanding of the average man and unembraced by the morals of the day. Without its protection, serious works ahead of their time might fall victim to the censor.

There can be no doubt that in an obscenity prosecution, errors in instructions rise to constitutional levels. In *Rodgers v. Richmond,* 365 U.S. 534 (1963), the Supreme Court, in a habeas corpus case, at 546 commented on errors in instructions and held that:

> "[I]t would be manifestly unfair, and afford niggardly protection for federal constitutional rights, were we to sustain a state conviction in

> which the trial judge or trial jury . . . passes upon that claim under an erroneous standard of constitutional law."

This is no less true in an obscenity case. Indeed, not only is the result compelled by the due process clause, the first amendment compels this as well. The *Roth* test is a constitutional test. It is meant to separate material completely protected by the first amendment from that completely unprotected. When translated into jury instructions, the *Roth* test does not lose its constitutional vitality. When the test is incorrectly stated, the standard for locating the thin, but nonetheless important, line between material within or without the ambit of the first amendment's protection is warped, and these rights are thereby threatened.

For the foregoing reasons, It Is Hereby Ordered that the stay previously entered in this case is vacated; that the petition for a writ of habeas corpus is granted; and that petitioner is released from the custody, control and obligation of the respondents. The effect of this order is stayed 20 days to allow the district attorney to file, if he so desires, a notice of appeal. If such a notice is filed, the effective date of this order shall be further stayed until further order of the court. Should such a notice not be filed, this order shall take effect 21 days from the date of filing.

Dated: April 2, 1971.

/s/ Alfonso J. Zirpoli
United States District Judge